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No. 193

In the Supreme Court of the United States

OCTOBER TERM, 1939

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WATERMAN STEAMSHIP CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 537–541) is reported in 103 F. (2d) 157. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 103–119) are reported in 7 N. L. R. B. 237.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 11, 1939. The petition for a writ of certiorari was filed on July 10, 1939, and was granted on October 9, 1939. The jurisdiction of this Court rests on Section 240 (a) of the Judi-

cial Code, as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence to support the Board's findings that respondent discharged and refused to reinstate certain employees because they were members of a particular labor organization or had engaged in union activity.

2. Whether there is substantial evidence to support the Board's findings that respondent discriminated between two rival labor organizations in the issuance of passes permitting their representatives to board its ships, thus interfering with the employees' freedom of choice of bargaining representatives.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. Supp. IV, Sec. 151 *et seq.*) are set forth in the Appendix.

STATEMENT

Charges and amended charges (R. 23–25) having been filed by the National Maritime Union of America, a labor organization hereinafter referred to as the N. M. U., the Board, on October 9, 1937, issued its complaint and notice of hearing which were duly served on respondent (R. 26–29). The complaint, as thereafter amended (R. 29–32), al-

leged in substance that respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8 (3) and (1) of the Act (R. 29–32). Respondent duly filed its answer (R. 34–43), and a hearing was held from November 1 to November 5, 1937, before a trial examiner of the Board (R. 120–530).

On January 17, 1938, the trial examiner filed an intermediate report (R. 45–79) containing his findings and recommendations, to which exceptions were filed by respondent (R. 80–98) and by the Seamen's Reorganization Committee of the American Federation of Labor, as successor to the International Seamen's Union of America (R. 99–102), hereinafter referred to as the I. S. U., a labor organization which had been permitted to intervene in the proceeding (R. 126). On March 8, 1938, respondent, the I. S. U. and the N. M. U., appeared before the Board by counsel and were heard in oral argument (R. 102), and respondent submitted a brief in support of its contentions (R. 105). On May 18, 1938, the Board issued its findings of fact, conclusions of law, and order (R. 103–119). The Board's findings may be briefly summarized as follows:

Respondent is engaged in the operation of steamships in interstate and foreign commerce (R. 106). The N. M. U., which is affiliated with the C. I. O., and the I. S. U., which is affiliated with the A. F. of L., are rival labor organizations which admit to membership unlicensed personnel among seamen

(R. 106). In July 1937, the crew of two of respondent's vessels, the *Bienville* and the *Fairland*, changed their affiliations from the I. S. U. to the N. M. U. (R. 107–108). Respondent promptly dismissed the entire crews because of their membership in the N. M. U., thus violating Section 8 (3) and (1) of the Act (R. 108–114, 117). Respondent likewise violated those provisions of the Act by discharging Edmund J. Pelletier because of his membership in the N. M. U. and C. J. O'Connor because of his activities on behalf of another labor organization affiliated with the C. I. O. (R. 106, 113–117). The Board further found that respondent discriminated between the I. S. U. and the N. M. U. in the issuance of passes permitting union representatives to board respondent's vessels and thereby interfered with the employees' free choice of collective bargaining representatives in violation of Section 8 (1) of the Act (R. 106–107, 117).

Accordingly, the Board ordered respondent to cease and desist from the unfair labor practices found, and, as affirmative action necessary to effectuate the policies of the Act, required respondent to reinstate the discharged employees with back pay, including the reasonable value of maintenance on shipboard which they would have received had they not been discharged; to grant passes to the representatives of the N. M. U. in equal numbers and under the same conditions as to representatives of the I. S. U. or its successors; and to post appropriate notices (R. 117–11[illegible]).

On June 16, 1938, respondent filed its petition with the Circuit Court of Appeals for the Fifth Circuit to review and set aside the foregoing order of the Board (R. 1–21). The Board answered, requesting full enforcement of its order (R. 530–536). On April 11, 1939, the Court of Appeals set aside the Board's order, except for the provision requiring the reinstatement of C. J. O'Connor, which was modified and enforced (R. 537–542). The court held that the Board's findings of fact as to the unfair labor practices were not supported by substantial evidence (R. 539–541). On October 9, 1939, this Court granted the petition for a writ of certiorari.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In not holding that the following findings of the Board were supported by substantial evidence and were, therefore, conclusive under Section 10 (e) and (f) of the Act:

(a) That respondent discharged and refused to reinstate the entire crews of the *Bienville* (including Edmund J. Pelletier) and the *Fairland*, and also one C. J. O'Connor, because of their union affiliation or activity, in violation of Section 8 (3) and (1) of the Act;

(b) That respondent discriminated between two rival labor organizations in the issuance of passes permitting their representatives to board its ships, and thus interfered with the employees' freedom

of choice of collective bargaining representatives in violation of Section 8 (1) of the Act.

(2) In setting aside and denying enforcement to the Board's order, except as modified with respect to C. J. O'Connor.

SUMMARY OF ARGUMENT

I

If the Board's findings were supported by substantial evidence, they were conclusive on the court below. Section 10 (e) of the Act; *Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board*, 301 U. S. 142, 146–147; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 270–271; *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, 275; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229; *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299. The Board's findings that respondent discharged the crews of the *Bienville* and the *Fairland* in violation of Section 8 (3) and (1) of the Act are so supported. When the two ships reached their home port of Mobile, after voyages marked by the mass shift of the two crews from the I. S. U. to the N. M. U., respondent laid the ships up and dismissed the two crews. The Board's findings that the crews' change of union affiliation was the cause of their mass dismissal is supported by (a) re-

marks made by responsible officials of respondent at the time of the dismissals; (b) uncontradicted evidence that, in accordance with uniform maritime practice, it was theretofore the unbroken custom of respondent to retain part, if not all, of the crews of laid-up ships for work on repairs; (c) convincing evidence that the ships were laid up at this time in order to furnish a colorable pretext for eliminating the crews; and (d) clear proof of discrimination against the members of the two crews in the allotment of repair work during the lay-up of the ships.

The preferential hiring contract between respondent and the I. S. U. did not require the mass discrimination engaged in by respondent. The contract applied in terms only to the filling of "vacancies." Under general maritime practice, observed by both respondent and the I. S. U., neither the expiration of the shipping articles, the lay-up of a ship for repairs, or keeping a crew "standing by" without pay pending the next sailing of the ship, terminates the employment relationship and creates such vacancies. Respondent could not, of course, create vacancies by an outright discriminatory dismissal of the crews.

There is likewise substantial evidence that the two individuals separately dealt with by the Board, Edmund J. Pelletier and C. J. O'Connor, were discharged and refused reinstatement by respondent solely on account of their union membership or activities.

II

The Board's findings that respondent violated Section 8 (1) of the Act by discriminating in the issuance of passes to union representatives is supported by substantial evidence. Respondent admits that, while freely issuing passes to I. S. U. representatives, it consistently refused to admit N. M. U. representatives aboard its ships. Undisputed evidence shows that respondent's purported limitation of the I. S. U. passes to the collection of dues was not in fact enforced by respondent's officials. The discrimination constituted a plain interference with the free self-organization of the seamen in contravention of Section 8 (1) of the Act.

ARGUMENT

I

THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE BOARD'S FINDINGS THAT THE CREWS OF THE *BIENVILLE* AND THE *FAIRLAND* AND ONE OTHER EMPLOYEE WERE DISCHARGED IN VIOLATION OF SECTION 8 (3) AND (1) OF THE ACT

The Board found that respondent had discharged the crews of the *Bienville* and the *Fairland* because they had changed their union affiliation from the I. S. U. to the N. M. U., and that it had discharged one other employee, C. J. O'Connor, because of his union activity. These discharges, if made for the reasons found by the Board, were in direct contravention of Section

8 (3) and (1) of the Act. And it is settled that if the findings of the Board were supported by substantial evidence they were conclusive upon review in the court below. Section 10 (e) of the Act; *Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board,* 301 U. S. 142, 146–147; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261, 270–271; *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.,* 303 U. S. 272, 275; *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 229; *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.,* 306 U. S. 292, 299.

In our opinion the record in the present case contains clear proof of mass discrimination against employees. Yet the Court of Appeals, without discussing the evidence in detail, denied enforcement to the Board's order with the observation that "The evidence does not even point in [the] direction" of an illegal motive for the discharges, and that the Board's findings were "based on suspicion and not on the evidence" (R. 539). We submit that the court was clearly in error and that the Board's findings were supported not only by substantial evidence but also by the clear weight of the proof. This is demonstrated by a review of the evidence.

A. The Mass Dismissal of the Two Crews

Events preceding the dismissals.—Some time in June 1937, while the *Bienville* was at Le Havre, France, the unlicensed personnel voted unanimously to withdraw from the I. S. U. and to join the N. M. U. when they reached the first port of call in the United States (R. 156, 192, 211). This was Tampa, Florida, which was reached on July 1.[1] The schedule under which the ship arrived at Tampa called for stops thereafter at three other Florida ports for which cargo was carried, and for arrival at Mobile on July 11 (R. 371). By a memorandum dated July 1, respondent's port captain at the home port of Mobile (Captain Reed) ordered that the ship omit all intermediate stops except that at Pensacola, and go on "inactive status" for a period of 20 days upon her arrival at Mobile (R. 474–475; Resp. Exh. 25, set out *infra*, pp. 48–49).[2] Captain Reed, although at first testifying that he had had no word from the captain of the *Bienville* during the westward voyage other than the expected time of arrival, later admitted that his memorandum was based in part upon in-

[1] The shipping articles show that three members of the crew left the ship at Tampa on July 1. See Resp. Exh. 23; cf. R. 156. References to exhibits are to the originals thereof filed in the office of the Clerk. Excerpts from some of the exhibits are included in the Appendix.

[2] Apparently the Pensacola stop was also subsequently cancelled (R. 371).

formation received by him from the *Bienville* after it left Le Havre (R. 485–486, 490).

Upon the *Bienville's* arrival at Tampa, the entire unlicensed personnel, in a dramatic scene involving a debate on shipboard between organizers for the two unions, exchanged their I. S. U. membership books for N. M. U. books (R. 131–134, 156–157, 179–180, 192, 211). They then sent the N. M. U. organizer to the *Fairland,* which had just arrived at Tampa, and all except 3 of the unlicensed crew of that ship also joined the N. M. U. (R. 134–135, 224–225, 237). Officers of each ship were immediately made aware of these mass changes of union affiliation (R. 132, 133–135, 138, 224–225, 340–341, 425–426, 466). The I. S. U. representative at Tampa was also aware of these events and telephoned to the business agent of that organization at Mobile who made "representations" to respondent concerning the changes (R. 133, 506–507). Nicolson, respondent's executive vice-president, also apparently learned of the crews' shift prior to departure of the two ships from Tampa, for he testified that he permitted them to complete the voyage even though he knew that they had joined the N. M. U. (R. 294).

Remarks accompanying the dismissals.—Both the *Bienville* and the *Fairland* arrived at Mobile on July 5 (R. 161, 181, 201, 323), and the entire unlicensed crews of both signed off the shipping articles, and were informed that they were no

longer needed (R. 225, 326, 337, 341–342, 368, 381). There is uncontradicted testimony that Captain Reed, respondent's port captain at Mobile, and Captain Norville of the *Fairland* informed the crew of that ship in no uncertain terms that their change of unions was the reason for the dismissal and that they could keep their jobs if they quit the N. M. U. and rejoined the I. S. U. (R. 225–226). Executive Vice President Nicolson inquired from one of the seamen why the *Bienville's* crew changed to the N. M. U.; and when Port Steward Fagan learned upon inquiry of Pelletier, chief steward of the *Bienville,* that the stewards had joined the N. M. U., he said, "Well, I have got orders to lay you all off" (R. 158, 180–181, 443, 447).

Lay-ups of respondent's ships do not normally result in mass dismissals.—Respondent claims that the mass dismissals were occasioned not by the crew's change of union affiliation, as the Board found, but by the inactive status of the ships (R. 379). After routine inspection and repairs in drydock (R. 472–473), which were completed in 30 hours, the *Fairland* was kept idle for about 7 days (R. 324, 331), and the *Bienville* was tied up for about 27 days altogether (R. 323–324); when the ships sailed again both sailed with I. S. U. crews (R. 293, 37–38, 495). The testimony establishes, however, that inactive periods of this nature do not normally cause the lay-off of the *entire* crew of a vessel (R. 353–354, 238, 275). It was respondent's custom to retain at least a portion of

the crew (R. 362). In fact, Captain Norville, of the *Fairland,* did not know of a single previous lay-off of an entire crew during the 13 years he had served respondent (R. 353, 330). Executive Vice President Nicolson did recall one prior dismissal of an entire crew, but that occasion significantly resembled the cases of the *Bienville* and the *Fairland* in that, shortly before the lay-up for repairs in the summer of 1937, respondent discovered that the crew was composed of N. M. U. members (R. 300–301, 316–317, 319–321).[3]

Respondent's witnesses agreed with those for the Board that a sweeping dismissal was virtually unique and that at least a skeleton crew,[4] and usually the full crew, would normally be retained at work on the repairs while a ship is in drydock (R. 334, 359, 362, 402, 143, 144, 155, 189, 192–193, 197, 199–200, 206–207, 213, 232, 237–240, 246–251, 253–254, 256–258, 273–275). Nicholson admitted that there was plenty of work which the dismissed crews could have performed (R. 324, 325, 288, 321, 359–360, 398, 160, 162, 163, 202, 227, 247, 254, 274) and that, while there is no "set rule," crews are usually retained during repair work unless their services have been unsatisfactory (R. 296, 323). There is

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[3] This vessel, the *S. S. Pan Kraft*, was apparently the only one of petitioner's ships, aside from the *Bienville* and the *Fairland*, ever to carry an N. M. U. crew (R. 302).

[4] A skeleton crew is composed of about one-half of the number of men in the regular crew (R. 240).

no contention that the work of the two crews here involved was in any respect unsatisfactory.

Upon this evidence, the Board was plainly entitled to conclude that the mass dismissals of the two entire crews so soon after their shift to a new union was caused by respondent's hostility to the N. M. U. and its determination to keep that union out of its fleet of vessels. It is an inescapable inference that had the employees continued in the I. S. U., respondent would have observed its uniform custom of keeping the entire crew, and certainly at least a skeleton crew for work on the ships during the lay-up. And, as we shall show, *infra*, p. 30, if respondent could not use the full crew at work on the repairs, those of the seamen who could not be used would usually be kept "standing by" as members of the crew until the ships sailed again. The lay-up of a ship for repairs thus would not result, normally, in the dismissal of any of the crew.

Lay-ups arranged to facilitate elimination of the crews.—Apart from the foregoing evidence, which demonstrates that even a *bona fide* lay-up of the ships would not have led to a mass dismissal of their crews, there is abundant evidence to support the Board's finding (R. 110) that respondent arranged the dates and duration of the lay-ups for the purpose of facilitating the discriminatory elimination of the crews. There can be no other explanation for the morass of contradictions and

confusion in which respondent's executive officers became involved when they sought to explain patent discrepancies in their story that the lay-ups were arranged long prior to the crews' withdrawal from the I. S. U.

As already noted, the *Bienville* was hurriedly recalled to Mobile from Tampa, omitting three ports for which she carried cargo, and arrived at Mobile five days ahead of schedule (R. 371–372). The entire crew was laid off and the ship underwent extensive structural changes (R. 161, 195, 201, 381, 287–288, 324). While respondent at no time even made an attempt to explain the cancellation of the stops subsequent to Tampa, that is, at Gulfport, Panama City, and Pensacola, respondent's first witness, Executive Vice President Nicolson, testified that in May 1937 respondent had made "definite arrangements" to lay the *Bienville* up for a month when she arrived at Mobile in July (R. 287, 370). In support of this deliberate defense that there could not have been any possible thought of discrimination against the crews because of their change of union affiliation at the beginning of July, Nicolson asserted that steel and other materials had been ordered weeks before and "all preparations made" to lay up the ship when she arrived (*ibid.*).

On cross-examination, the witness was confronted with a schedule to which the attorneys for respondent had stipulated, in another Board pro-

ceeding,[5] on June 21, 1937, a mere 10 days before the ship's arrival at Tampa. According to that schedule the *Bienville* would remain at Mobile only from July 11 to 15, admittedly an insufficient time for the repairs which were supposed to have been planned since May (R. 370–372). Thereupon Nicolson completely abandoned his elaborate defense and withdrew his prior testimony, stating that it was "quite possible" that the steel and other materials had been purchased for the *Azalea City*, a sister ship of the *Bienville*, that "it is possible we substituted" the *Bienville* later as the ship to be repaired, and that he was "not sure" that plans had been made to lay up the *Bienville* during July (R. 372).[6]

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[5] *In the Matter of American France Line et al.*, 3 N. L. R. B. 64.

[6] In the court below respondent sought to minimize the complete collapse of Nicolson's explanation by emphasizing his diverse responsibilities. However, Nicolson was called as a witness by respondent to testify concerning the very details upon which he found it necessary to change his testimony. Repeatedly he carefully refused to testify concerning matters as to which he did not have personal knowledge (R. 289, 293, 313, 324, 360, 388), but apparently he had no doubt concerning the purported plans to lay up the *Bienville*, and testified without qualification or hesitation (R. 287, 370). He had overnight to consider his testimony (R. 302–303) and specifically stated on the next day that he did not wish to qualify any of his prior testimony (R. 365). Then, after presentation of the stipulation, he changed the whole line of his testimony (R. 371–372). That Nicolson's recollection could be faulty to this degree is difficult to believe; lay-ups which involved discharge of entire crews were unique in respondent's history (*supra*, pp. 12–14), and in this case

Respondent never challenged the authenticity of the stipulation which exploded Nicolson's attempted defense, but it did introduce into evidence a schedule (which had been attached to the memorandum of July 1 referred to *supra*, p. 10) which provided for the *Bienville* to be at Mobile from July 7 to 30 (R. 475, Resp. Exh. 25, *infra*, p. 48). This schedule was headed "Sailing Schedule, April through August 1937," and Port Captain Reed identified it as having been in his possession as early as April 1937 (R. 475–476). On cross-examination, however, when reminded of the stipulation, he said, "There is a possibility that the schedule may have been changed" (R. 489). Reed admitted that he could not explain the existence of conflicting schedules during successive months and stated that he had no record of any change in the schedules (R. 493, 489).[7]

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had been promptly made the subject of proceedings before the Board.

In any event, Nicolson's diverse responsibilities do not explain the similar story marked with similar contradictions told by Ingram, respondent's assistant port engineer. Ingram first testified that the decision to lay up the *Bienville* when she arrived in Mobile had been made after the ship left Le Havre and that materials had then been ordered for that purpose (R. 394, 411–412). But he thereafter expressed doubt whether the materials were ordered for the *Bienville* or for the *Azalea City*, and finally admitted that he had played no part in reaching a decision concerning the repairs until after the vessel arrived at Mobile (R. 411, 412, 420).

[7] Nicolson's testimony establishes that the June 21 schedule (the one in the stipulation), and not the one identified by Reed, was in effect when the *Bienville* arrived at Tampa. Nicolson testified that the July 2 sailing from Tampa was

In the case of the *Fairland* it is even more apparent that the lay-up was arranged in order to facilitate elimination of the crew because of their change to the N. M. U. When the *Fairland* left Tampa, where its crew had shifted to the N. M. U., it was respondent's plan that at Mobile the ship would receive the normal periodic drydocking of 24 to 48 hours and Captain Norville was so notified (R. 292–293, 313–315, 341–343, 346–347, 472–474, 480–481. There is no contention by respondent that inactivity of the vessel for that period would cause dismissal of any of the crew.* But when the ship docked, Assistant Port Engineer Ingram instructed Captain Norville to dismiss the crew since the ship would be idle for 6 or 7 days (R. 326, 342–344). Norville testified that Ingram did not ex-

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on schedule and the July 5 arrival at Mobile was 5 days early (R. 371–372). The June 21 schedule provided for the vessel to leave Tampa on July 2 and arrive at Mobile on July 11 (R. 371); the "April" schedule provided for the ship to reach Mobile on July 7 (Resp. Exh. 25, *infra*, pp. 48–49). Indeed, Reed's memorandum of July 1 is inconsistent with any contention that the schedule to which he testified was in effect when the *Bienville* reached Tampa, for a change in plans was apparently necessary in order to bring the ship to Mobile in time to make the repairs. Nor can this omission of the intermediate ports be explained by any assertion that the ship was late: Reed's statement said the vessel was due to arrive at Tampa on July 1 and it did arrive on that date (R. 475, *supra*, note 1, p. 10).

*Compare Nicholson's unqualified testimony: "If we kept the vessel in drydock for five days, say, we would keep the full crew by her, but if we kept her laid up seven days, we would think very carefully whether we could use the crew then" (R. 387; see also R. 344).

plain the reason for the change of plans to him (R. 343–344), but, as we have seen, Norville told the seamen they were not needed because they had joined the N. M. U. (*supra*, p. 12; R. 225). The ship speedily underwent the routine drydocking, was back in the water within 30 hours ready for service, but was kept idle for several days without any apparent reason (R. 324, 331, 387).[9]

At the hearing it was sought to discover when the change of plans for the *Fairland* from the normal brief drydocking to a more extended lay-up was made. Ingram testified that he, Nicolson, and Port Engineer Lemon had decided upon the change, but would not fix the date (R. 400–401). According to Ingram, the decision might have been a "quick change" made after the ship left Tampa, where the crew had joined the N. M. U. (R. 400). It affirmatively appears from Nicolson's testimony that the decision was made after the crew changed to the N. M. U. and after the vessel sailed from Tampa (R. 368; see R. 343).[10]

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[9] It does not clearly appear just how long the *Fairland* was inactive (R. 425, 324, 326, 337). She arrived on July 5, was in drydock for 30 hours, and sailed again about July 15 (R. 337–338). Since it takes about 3 to 4 days to load cargo on one of respondent's ships (R. 476–477), the period of total inactivity must have been about 4 or 5 days. Nicolson thought the vessel was inactive for a total of 7 days, including the drydocking period (R. 324).

[10] It appears elsewhere in Nicolson's testimony that the decision to dismiss the crew of the *Fairland* was made after the vessel arrived at Mobile (R. 292).

Casting equal suspicion upon the *bona fides* of the extended lay-up of the *Fairland* were the conflicting reasons given for it. Nicolson explained that business was slack, the *Fairland* was late, and that "We decided to put her back a week on schedule" (R. 367–368). He testified that no "repairs to speak of" had been made other than to clean and paint the ship and draw its tail shaft, all of which accounted for only 30 hours of the lay-up (R. 387, *supra*, p. 19). A setting back of the schedule was the reason finally given to Captain Norville (R. 344). But Port Captain Reed testified that such omission of a voyage was unusual, that he did not know whether the *Fairland* was late, that he would have been advised of a change in the schedule, but that he did not remember whether he had received notification of the plan to which Nicolson testified (R. 490–491).[11] Neither did Ingram say anything about the ship being behind schedule; he gave as the reason for the lay-up a detailed list of repairs which he said were made (R. 390–392).

From the foregoing evidence, the Board was entitled to conclude that respondent arranged the lay-ups in order to facilitate elimination of the crews. This confirms the inference, already strong from the remarks which accompanied the dismissals and from the unique nature of the mass

[11] Before this point in his cross-examination, Reed did not mention lateness as a reason for laying up the *Fairland*. He mentioned only the inspection and slight repairs which made it necessary for the ship to go into drydock for 30 hours (R. 472–474).

action, that the crews were dismissed because of their membership in the N. M. U.

Discrimination in allotment of repair work.— The Board's conclusion becomes irresistible when respondent's patent discrimination against the members of these two crews in the allotment of work on the repairs is considered.

It was respondent's uniform custom to use the crews of drydocked vessels in the shore gangs working on repairs and to "send word out" to the crews that such work was available for them (R. 401, 422, 392.)[12] The Board found (R. 108), and there is evidence to support its finding, that it was not until after Nicolson had received from the Board's Regional Director a telegraphic request that the N. M. U. members be reinstated without discrimination pending an election to be held upon petition of the I. S. U., that the usual word was sent to the crews of the *Bienville* and the *Fairland* (R. 360, 369–370, 403; Resp. Exh. 19). Nicolson's testimony that this was merely a "coincidence in time" is inconsistent with his statement that the men were given jobs because respondent did not wish to discriminate against the N. M. U. (R. 370, 369).

[12] The preferential hiring contract between respondent and the I. S. U., discussed, *infra*, pp. 23–30, had no application to this work. It did not in terms apply to shop work and it is conceded that it applied only to jobs as members of the crew (R. 288, 291, 368).

A gang of about 125 men worked 16 to 24 hours a day on the *Bienville* (R. 324–325, 288–289).[13] Some of the men discharged from the ships were employed at this work for short periods (R. 159, Resp. Exh. 19). One of them, an employee named Stewart, testified that Ingram told him to remove his N. M. U. button, warning him that "You are not going to keep on this job with that button, with that N. M. U. button on, or by carrying that [membership] book," and offered him employment as a seaman if he would rejoin the I. S. U. (R. 226–227, 393, 415). Upon Stewart's refusal, Ingram discharged him from the shop gang doing repair work (R. 227). When Stewart sought to sign on for the *Fairland's* next voyage, Ingram and Captain Norville told him to leave the ship and not to come back since he belonged "with those radicals" (R. 228). Neither Ingram nor Norville denied this testimony.

Ingram also warned Turner, a member of the *Bienville* crew, to remove his N. M. U. button; Turner complied but was subsequently discharged

[13] The major portion of this gang was probably already at work when word was given the seamen discharged from the two ships that they could come to work. The repairs were commenced on July 6 and the telegram to Nicolson was received on July 7 (R. 369). It does not appear exactly when respondent sent out the notice but the seamen started work on July 8 (Resp. Exh. 19). On the previous day the number of men employed in the shops had risen to 175 from the 108 employed on July 6 (Resp. Exh. 20).

with the warning that he had better rejoin the I. S. U. if he wished employment (R. 159–160). The work upon which Turner was engaged was not finished at the time of his dismissal (R. 160). On the same day other members of the two crews working in the shops were dismissed, although their work was not yet done (R. 162–163, 202–203, 227). Respondent offered no credible explanation for these discharges at the hearing. Its treatment of the N. M. U. members whom it took into the shop after intercession by the Board's Regional Director thus furnishes cogent proof of its determination to eliminate the N. M. U. from its crews.[14]

The defense based on respondent's preferential hiring agreement with the I. S. U.—Respondent contends that, whatever respondent's motives, the Board could not find that the crews were discriminatorily discharged for the reason that the employment of the seamen terminated upon expiration of the shipping articles under which they sailed (R. 189–190) The argument is, in brief, that the crews' employment was for a term only, that at the end of that term their positions automatically became

[14] The only reference by the court below to this evidence was its statement that "some of the members of the crews were employed in the shops while the ships were laid up" in support of its statement that respondent did not "make war on the unions" (R. 539). The court did not refer to the circumstances or duration of the crews' shore work, nor to the clear discrimination against them in such work because they would not leave the N. M. U.

vacant, and that respondent was bound by the preferential hiring agreement in its contract with the I. S. U. (Resp. Exh. 14, set out *infra*, pp. 45–48) to fill the vacancies from the membership lists of that union.[15] The argument that vacancies were thus created finds no support in, but rather is contradicted by, the terms of the contract and its uniform interpretation and application by respondent and the I. S. U. Likewise, the proof affords overwhelming support for the Board's findings (R. 109–110) that the mere termination of a voyage covered by shipping articles does not terminate the employment relation without some further action by either the employer or the employee (*infra*, pp. 26–28).[16]

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[15] The preferential hiring provision of the contract is as follows (Resp. Exh. 14, Art. II, Sec. 1): "It is understood and agreed that, as vacancies occur, members of the International Seamen's Union of America, who are citizens of the United States, shall be given preference of employment, if they can satisfactorily qualify to fill the respective positions: provided, however, that this Section shall not be construed to require the discharge of any employee who may not desire to join the Union, or to apply to prompt reshipment, or absence due to illness or accident."

[16] The shipping articles covering the voyage of the *Bienville* terminating at Mobile on July 5, 1939, provided as follows (Resp. Exh. 23):

"IT IS AGREED between the Master and seamen, or mariners, of the SS Bienville, Mobile, Ala., of which F. O. LUND is at present Master, or whoever shall go for Master, now bound from the Port of Mobile, Ala., to HAVRE, FRANCE—ONE OR MORE COASTWISE PORTS and such other ports and places in any port of the world as the Master may direct, and back to a final port of discharge in

The contract between the I. S. U. and respondent demonstrates that both parties recognized the continuity of the employment relation between voyages covered by shipping articles and that they meant the contract to cover the relation between voyages and articles as well as during them. The contract provisions regulating subsistence allowance applied when "the men are on articles or port pay roll" (Art. III, *infra,* p. 46). Article IV of the contract, in providing terms of employment of unlicensed personnel, sets hours and rates of pay for overtime "in home port," which it defines as the port at which the articles are opened or closed (*infra,* pp. 46–48).[17] The parties must have in-

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the United States, for a term of time not exceeding TWELVE calendar months." When the crew members were "discharged" from the articles, they signed the following statement, also signed by the captain:

"We, the undersigned seamen, do hereby, each one for himself by our signatures herewith given in consideration of settlements made before the shipping commissioner, release the Master and owners from all claims for wages in respect of this voyage or engagement, and I, the Master, do also release each of the undersigned seamen from all claims, in consideration of this release signed by them" (R. 431).

[17] Respondent's licensed engineers also sail under shipping articles (Bd. Exh. 11, Sec. 18). The contract between respondent and the M. E. B. A., as representative of the engineers, in providing for vacations with pay after a minimum period of service "from the time of entering the employ of the company" plainly presupposes a continuing employment relation (*ibid.*, Sec. 17; R. 268).

tended the provision protecting nonmembers of the I. S. U. from "discharge" (note 15, p. 24, *supra*) to apply in the interim between articles, for the articles themselves protect the seamen from dismissal during their term.

The proof is clear that prior to this litigation neither respondent nor the I. S. U. understood that the expiration of shipping articles created "vacancies" within the meaning of the agreement. It was respondent's custom to canvass the crews a day or two before the end of a voyage in order to list the seamen who would sign on for the next voyage (R. 192, 200–201, 212–213, 220). There was no inquiry whether the men were still union members, for the I. S. U. did not require seamen who signed off articles at the completion of a voyage to go through the rotation lists at the hiring hall as a prerequisite to signing on the next voyage (R. 340, 143, 150, 166, 344, 358–359, 378, 503, 523). All of respondent's crews were initially secured from those rotation lists, but they applied only to "unemployed" seamen, whereas the crew of an incoming ship were regarded as continuing in respondent's employ despite the expiration of shipping articles (R. 149–150, 374, 377–378).

Nicolson testified without contradiction that under the contract seamen who were not members of the I. S. U. could work for respondent indefinitely "provided they did not leave our employ"; that is, by quitting or through dismissal for cause (R. 377–378, 350–352). All members of the

crew who were satisfactory and did not quit were kept aboard the vessel and signed on for the next voyage (R. 334, 358–359, 482, 520). And during the intervals between articles, the seamen remained on respondent's pay roll and continued to perform without interruption the duties of crew members, such as standing watch, aiding in loading and unloading, and cleaning the ship (R. 308, 151, 154–155, 178, 199, 223, 229–230, 266, 336, 476–477, 482, 519–520). When asked whether the employment of the two crews here involved had terminated "when the time expired" or whether respondent had terminated their employment, Nicolson said, "We terminated their employment at the time their contract was up" (R. 294).

Testimony concerning the custom in the maritime industry as a whole buttressed the above proof that neither respondent nor the I. S. U. had ever deemed employment to terminate upon expiration of shipping articles. Neither employer nor employee regards the relation as ended with the articles; the difference between "discharge" from articles and dismissal from employment is well recognized (R 150–151, 161, 166, 178–179, 187–188, 193, 211–212, 221, 229–230, 241, 243–244, 252–253, 255, 257, 275, 334–336, 350–351, 429, 431–434, 520). The maritime unions acknowledge the continuity of employment between sets of articles and use the term "vacancy" to refer to the situation which exists when an employee resigns or is dismissed for cause and the company calls the hiring hall for a

replacement (R. 143–144, 161, 179, 200, 213, 230, 241–242, 276, 503).

The foregoing testimony was not controverted at the hearing. The testimony adduced by respondent and the I. S. U. established merely that the employment relation is terminable at the will of either party between voyages covered by shipping articles and that the employer is not, therefore, under any "obligation" to reship the crew (R. 427–430, 438, 471, 495–496, 522–524).

Respondent further contends, apparently as an alternative to the argument that "vacancies" were created when the articles expired, that the expiration of the articles plus the lay-up of the ships terminated the crews' employment and required application of the preferential hiring agreement (R. 142). If the evidence supports the Board's findings that the lay-ups were arranged for the purpose of facilitating dismissal of the two crews, as it clearly does (*supra*, pp. 14–21), the argument must fail. Respondent could not, consistently with the Act, designedly manipulate the schedules of its ships in order to create a colorable claim that the preferential agreement applied. Such discrimination could not terminate the employment relationship within the contemplation of the National Labor Relations Act (Section 2 (3)) or create a "vacancy" within the meaning of the agreement. Cf. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 231 *et seq.*, 244 *et seq.*

Even if the lay-ups were of wholly lawful motivation, however, they still could not be said to create "vacancies" within the meaning of the agreement. As already noted, the dismissal of an entire crew during repairs was a distinct departure from respondent's custom, and there was, in fact, plenty of work which these crew members could have performed (R. 202, 227, 325). It is customary to use the crew on repair work (R. 151, 155, 178, 189, 192–193, 197, 199–200, 202, 206–207, 213, 227, 232, 237–240, 246–250, 253–254, 256–258, 273–275, 321, 359, 362, 402). If that were done, clearly no "vacancies" would be created (R. 178, 241–242). The reasons assigned by respondent for not observing its custom in this case go only to the asserted impracticability of housing the men aboard the ships, not to any reason why they should not have worked on the repairs (R. 359–361, 287, 292, 325, 326, 331, 477).[18]

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[18] The reasons were inadequate even to explain lack of housing facilities. The steam was shut off, but it was not asserted to be necessary for heating purposes, but only for operating the sanitary pump (R. 287). And the drydock has compressed air available to operate the sanitary pumps of vessels whose fires have been closed down (R. 333–334). The officers continued to stay aboard the *Fairland* (R. 353), and probably aboard the *Bienville* (R. 160), despite the asserted lack of sanitation. While it is claimed that structural repairs to the *Bienville* would have made housing the crew inconvenient, it is not so asserted with respect to the *Fairland*, and the drydocking of the *Fairland* would not have caused shut-down of the steam had it not been for the additional unexplained lay-up of the ship (R. 332).

Further, the evidence is uniform that, even if there is no work for some or all of the seamen, the customary procedure is for the idle men to "stand by" the ship, without pay but as its crew, ready to rejoin it when it sails, and that when that is done "vacancies" are not thought to exist within the meaning of the agreement (R. 143, 163–164, 166–167, 188, 199–200, 206–207, 215–218, 240–241, 244, 246, 250, 251, 253, 258, 274, 296, 347, 438).[19] Respondent did not controvert the existence of this practice and offered no reason why it was not followed. The officers of the *Bienville* apparently thought that respondent would follow the practice during the lay-up here involved (R. 161, 220); the officers asked various seamen, after the vessel left Tampa, whether they wished to make another voyage (R. 192, 200–201), and the crew members were not informed of their impending dismissal until the arrival at Mobile (R. 158, 186).

We think that this uniform practice effectively disposes of any contention that the agreement between respondent and the I. S. U. required elimination of the N. M. U. crews. Respondent's reasons must be sought elsewhere than in the preferential hiring contract. It is submitted that, upon the foregoing evidence, the Board's findings as to the real motives are supported by the clear weight of the proof.

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[19] Crew members who are "standing by" are not required to go through the union's rotation hiring lists (R. 166, 240).

B. The Two Individual Discharges

The Board found that respondent discharged and refused to reinstate C. J. O'Connor and Edmund J. Pelletier because of their union membership and activity, in violation of Section 8 (3) of the Act (R. 113–117). The court below modified the Board's order as to O'Connor and set it aside as to Pelletier, specifically rejecting in each instance the Board's findings of illegal discrimination (R. 540–541).[20] We think those findings are amply supported and that the Board's order is valid as to both employees.

O'Connor.—O'Connor, an employee of eight years' service with respondent, was second

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[20] It is not apparent why the court modified and enforced the order as to O'Connor rather than setting it aside *in toto*. As modified, the order provided that (R. 542): "C. J. O'Connor is entitled to pay for the number of days the company allows and grants for vacation to its employees in his class. Upon application he is also entitled, if he can satisfactorily qualify, to be offered reinstatement to his former position."

If the Board's findings that O'Connor was discharged in violation of Section 8 (3) were supported by substantial evidence, the cease and desist provisions and the pertinent portion of the reinstatement and back pay provisions of the Board's order were entitled to enforcement. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265; *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333. If the Board's findings of illegal discrimination were not so supported, neither the Board nor the court was authorized to settle the equities between O'Connor and respondent.

assistant engineer on the S. S. *Azalea City;* he was selected by the other engineers on that ship to represent them in complaining, during a voyage, against certain practices they thought to be violative of the overtime provisions of the contract between respondent and the M. E. B. A., a labor union affiliated with the C. I. O., to which the engineers belonged (R. 257, 262–263, 267). O'Connor made the protest and insisted that it be entered in the log book as a basis for a future claim for pay (R. 263. 267–268).[21] When the ship reached Gulfport, Ingram, who was respondent's assistant port engineer at Mobile and O'Connor's superior, came aboard, discussed the complaint with O'Connor, and told him to take a vacation when the vessel docked at Mobile and that the matter would be straightened out (R. 263–264, 268–269, 389, 405, 422). Ingram also said that he had a job on a coastwise vessel for O'Connor, in fulfillment of a prior promise to O'Connor (R. 264, 270, 405, 411). Relying upon his superior's instructions and promise, O'Connor left the ship at Mobile (R. 264). He was never recalled to work, although it is respondent's practice to recall by telephone engineers who are awaiting assignment, and although there were vacancies which O'Connor could have filled (R. 266, 406–408, 409).

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[21] Captain Nicolson could not recall any prior occasion when one of the engineers had acted as spokesman for others in protesting asserted violations of the contract (R. 379).

Respondent first contended that O'Connor voluntarily left the *Azalea City* (R. 35), but when Ingram corroborated O'Connor's testimony as to his instructions and the promise of a coastwise berth (R. 389, 405, 411, 422), respondent advanced the assertion that an engineer on vacation should notify Ingram when he is ready to go to work (R. 390). Two answers are returned by the evidence. (1) Engineers not on vacation, but awaiting placement, are notified by respondent when to report, and respondent informed O'Connor soon after he left the *Azalea City* that he was not entitled to a vacation (R. 266, 270, 390, 405–407). (2) O'Connor did apply for work, but Ingram would not answer the request and testified that it was not sufficiently "formal," that he thought O'Connor was "joking" and his request "fantastic" (R. 265, 269–270, 408–410).[22]

No reason whatever appears on the record for this elimination of an employee of eight years' service except his assumption of the leadership in a dispute with respondent concerning terms of employment. The Board was entitled to find (R. 116) that O'Connor was discriminated against for that reason.

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[22] When asked "Didn't he ask you about going to work?", Ingram testified, "No, sir; he said 'would Waterman give me employment.' He did not mention it direct" (R. 409). Later Ingram said, "Well, he didn't say he was ready to go back; he asked for employment" (R. 410).

Pelletier.—Pelletier, chief steward of the *Bienville,* joined the N. M. U. and was discharged along with the rest of the crew, with pointed reference to the shift of union affiliation (R. 176, 179, 180–181, 443, 447, 452).[23] Respondent's claim is that he was discharged for inefficiency (R. 208–209).

Port Steward Fagan inquired whether Pelletier and his subordinates had joined the N. M. U., and upon being informed that they had, instructed Pelletier to dismiss the stewards (R. 180–181, 443). He then accused Pelletier of incompetency in connection with an incident preceding the *Bienville's* last voyage and dismissed him (R. 443–444, 447–448). The incident, a request for an additional mess boy to serve the crew, furnished the flimsiest sort of pretext upon which to base a claim of inefficiency (See R. 443–444, 448–450, 452, 453–454, 458–459, 524–528). Fagan, although he sought to give the impression on the witness stand that respondent had been having difficulty with Pelletier for some time, had himself promoted Pelletier to the position of chief steward—a promotion carrying a pay increase—just prior to his last voyage (R. 176, 444, 450, 453–454). Pelletier worked for

[23] The chief steward is usually retained during lay-ups and an I. S. U. steward was assigned to Pelletier's duties immediately upon his dismissal (R. 181, 188–189, 190, 446, 451, 456–457). There is hence no claim that the lay-up of the *Bienville* was the cause of Pelletier's discharge, and for that reason it was dealt with by the Board separately from the discharge of the remainder of the *Bienville* crew.

respondent from 1934 until his discharge in 1937 (R. 176).

Respondent also based its claim that Pelletier was inefficient upon a letter from the *Bienville's* captain to Port Captain Reed (Resp. Exh. 26, set out, *infra,* pp. 49–50), in which he complained about Pelletier (R. 444). But Fagan testified that there were similar complaints against any steward on any ship on practically every trip, and that he had never discharged another chief steward because of them (R. 461–463, 468–469). He apparently was not interested in the complaints against Pelletier, for when the ship docked at Mobile, Fagan asked the mate how the steward's department was, and when the first information forthcoming was that the steward and his subordinates had shifted to the N. M. U. he inquired no further (R. 447, 466). Finally, the letter was not mentioned when Fagan discharged Pelletier; the mess-boy incident preceding the sailing of the *Bienville* was the only reason Fagan gave at that time (R. 450).

Conclusive proof that respondent's objection to Pelletier was based upon his membership in the N. M. U., not upon the incompetency alleged, is afforded by respondent's willingness to reinstate Pelletier when he rejoined the I. S. U. Pelletier testified without contradiction that after he had returned to the I. S. U. and was on the rotation lists Fagan inquired how far up on the list he was and, when Pelletier replied that he was seventh or eighth,

said "It won't be long now before you go to work" (R. 182–183).

The proximity with which Pelletier's discharge followed his shift to the N. M. U., together with the implausibility of respondent's explanation, justified the Board in concluding (R. 113–114) that Pelletier's discharge was merely another expression of respondent's hostility to the N. M. U. and of its determination to keep that organization off its ships.

The record affords no explanation even remotely convincing for respondent's elimination of the employees here involved other than their affiliation with a new labor organization, the N. M. U., to which respondent was opposed. The unprecedented mass dismissals of two entire crews upon lay-ups which normally would not have occasioned such dismissals, together with statements by responsible officials of respondent that the men's affiliation with the N. M. U. was the reason for the action, the convincing proof that the lay-ups were arranged by respondent to facilitate elimination of the crews, and, finally, the hostility toward the N. M. U. evidenced in respondent's patent discrimination against members of that organization in the work on repairs and in its refusal to issue ship passes to N. M. U. organizers although passes were freely issued to I. S. U. officials (discussed

infra pp. 37–42), all afford a substantial basis for the Board's findings. The court below either denied competency to all evidence favorable to the Board's findings or completely ignored such evidence when it stated, without any review of the evidence, that (R. 539):

> The evidence is virtually without dispute that repairs on the S. S. *Bienville* and S. S. *Fairland* had been planned by the company long before the crews changed their membership from one union to another. When the ships were laid up for repairs it was only for reasons of economy, we think, that the crews were discharged. There was no effort on the part of the company to make war on the unions. The evidence does not even point in that direction. Some of the members of the crews were employed in the shops while the ships were laid up.[24]

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[24] The "economy" motive which the court found is simply incomprehensible. As noted, shipowners usually employ the crew on repairs and; in the event that they do not wish so to use the crews, may keep the men "standing by" without pay until the ship is ready to sail again, and this temporary furlough does not terminate the employment relation. An employee who is "standing by" pending the next voyage is no more entitled to wages or expenses during the time he is not working than an employee who has been validly dismissed. Respondent asserted at the hearing that the steam on the ships was shut down for reasons of economy (R. 367) but never made any effort to explain in what way dismissal of the crews would save it money.

II

THE BOARD'S FINDINGS THAT RESPONDENT VIOLATED SECTION 8 (1) OF THE ACT BY DISCRIMINATING IN THE ISSUANCE OF PASSES TO UNION REPRESENTATIVES ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

The Board found that respondent violated Section 8 (1) of the Act by discriminating between the I. S. U. and the N. M. U. in the issuance of passes permitting representatives of those unions to board its ships (R. 106–107, 117). It is not disputed that respondent issued passes to I. S. U. representatives pursuant to its contract with that organization (Resp. Exh. 14, Art. II, Sec. 3, *infra*, p. 46); respondent admitted in its answer that it had refused to issue passes to N. M. U. representatives and stated at the hearing that it would not grant passes to that organization under any circumstances (R. 38–39, 136–137, 139). There is no contention that the contract in terms vested in the I. S. U. an exclusive right of access to the employees, nor does respondent claim that a patently unequal treatment of the two unions would not violate the Act. What respondent contends is that it maintained an equal balance by denying to both organizations alike the privilege of soliciting members aboard its ships. The I. S. U. representatives, respondent says, were permitted to board the ships solely in order to collect dues, and it urges that such access to the ships did not vest in the I. S. U. such

an advantage as to constitute interference under Section 8 (1) of the Act. This defense clearly fails on the facts.

On July 17, 1937, soon after the mass discharge of the crews of the *Bienville* and the *Fairland*, Executive Vice President Nicolson sent to the masters of all respondent's vessels instructions that, in view of the pending elections to determine whether the N. M. U. or the I. S. U. represented the unlicensed personnel on respondent's ships, delegates of neither union were to be allowed to board the ships for the purpose of soliciting members (R. 41–42, 173, 298). However, respondent's officers continued to allow the I. S. U. delegates aboard the ships, ostensibly for the purpose of collecting dues, and took no steps whatever to enforce Nicolson's directions that the I. S. U. representatives be not permitted to solicit members or otherwise influence the choice of a bargaining representative. Captain Norville of the *Fairland* did not know whether the I. S. U. representatives admitted to his ship restricted themselves to the collection of dues (R. 339), and the uniform testimony is that their relations with the seamen were not subjected to any restrictions whatsoever (R. 179, 373, 498). Although the Board's Regional Director protested that respondent's action was not in accord with the Board's direction in the election proceeding (R. 137–138, 140–141; Bd. Exhs. 9, 10), respondent

would not reconsider its refusal to issue passes to the N. M. U.[25]

The Board's finding of discrimination between the two unions was thus plainly supported by substantial evidence. The view of the court below is equivalent to a holding that a blanket instruction by the head of a company to its officials and supervisors is a complete defense to a subsequent complaint alleging discrimination, regardless of how clear the proof may be that discrimination in fact occurred and was tolerated.

Respondent's secondary defense consists of a contention that the N. M. U. had no members aboard its ships, so that the exclusion of its representatives could not harm it. The defense is probably untenable in fact and is in any event insufficient. The representation of respondent's crews

[25] The elections were directed to be held as part of a proceeding initiated upon a petition by the I. S. U. under Section 9 of the Act asserting that a question affecting commerce had arisen concerning the representation of the unlicensed seamen employed by respondent and certain other companies. On July 16, 1937, the Board issued its Decision and Direction of Elections to determine which union was the authorized representative of the crews employed by each company (Bd. Exh. 6; 3 N. L. R. B. 64). On August 16, 1937, the Board issued a Supplemental Decision in the representation case noting that some of the companies were discriminating in the issuance of passes and that this practice constituted an interference with the elections. The Board directed that the preference should cease (Bd. Exh. 7; 3 N. L. R. B. 74, 76). Because of the pendency of the present unfair labor practice proceeding, no election was ever held among respondent's employees (see 12 N. L. R. B., No. 82).

was in doubt despite its contract with the I. S. U.; indeed, it was that organization which filed a petition asserting that a question concerning representation had arisen. The Board found that the division of the employees' loyalties necessitated an election (note 25, p. 39, *supra*). The N. M. U. probably had many members or sympathizers among respondent's crews. It was entitled, in any event, to an equal opportunity to compete with the I. S. U. for the allegiance of those seamen who were not affiliated with either union. The vigorous debate between representatives of the two organizations which preceded the mass shift to the N. M. U. of the two crews here involved illustrates the value, to each organization, of an opportunity to present its case (R. 131–135).

The court below stated that it might conclude from the evidence that if representatives of both unions had been allowed to board the ships to solicit members "business and shipping in all probability would be shunted aside while the rival unions stage a battle for supremacy" (R. 540). There is no evidence whatever to support such a conclusion.[26]

[26] In this respect, among others, the case is materially different from *Peninsular & Occidental S. S. Co.* v. *National Labor Relations Board*, 98 F. (2d) 411 (C. C. A. 5th), *certiorari denied*, 305 U. S. 653, where the shift of part of each crew to the N. M. U. created hostile factions and, according to the court, gave rise to sit-down strikes and threats of sabotage and mutiny. The court regarded the mass discharge of the crews as a justified safety measure (98 F. (2d) at 415). The unanimity of the shift in the present case avoided any such situation and there is neither evidence of

Further, both the discrimination and all danger of strife could have been avoided by barring solicitation by either union, as respondent purported to do. The discrimination which actually occurred here consisted of respondent's real and effective ban upon solicitation by the N. M. U. while it made but a pretense of halting solicitation by the I. S. U., thus manifestly according the latter organization a decided advantage in organizing the men and in preparing for the election. It is contrary to human experience to assume that solicitation would not go on merely because of executive pronouncement that representatives of the I. S. U. were to be given freedom of the ships solely to collect dues. Respondent's conduct constituted a plain interference with the free self-organization of its crews in direct violation of Section 8 (1) of the Act.[27]

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any disobedience nor any claim that safety required the crew's elimination, the sole reason advanced being the lay-up of the two ships. Further, the statements that N. M. U. men could not sail on respondent's ships (*supra*, p. 12) were made by high officials of respondent who belonged to no union; it has not been contended, as it was in the *Peninsular* case, either that such utterances were unauthorized or that they constituted permissible propaganda by union members on behalf of their own unions.

[27] Parenthetically, it may be noted that respondent's assertion as to the extent of its liability under the order of the Board is inaccurate as well as irrelevant. In respondent's brief in opposition to the petition for certiorari, the statement is made (p. 2) that the back pay required by the Board's order amounted to more than $200,000 at the time that brief was filed. No indication was given of how counsel computed this amount, but the computation is manifestly erroneous. It apparently takes no account of earn-

CONCLUSION

It is respectfully submitted that the decision of the court below setting aside and denying enforcement to the order of the Board, except as modified and approved as to O'Connor, should be reversed, and the cause remanded with directions to grant the order full enforcement.

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NOVEMBER 1939.

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ings since the discharge, which are deductible from the amount to be paid under the order (R. 118). Nicolson testified that about half of the discharged employees were at work on respondent's ships at the time of the hearing, having rejoined the I. S. U. (R. 290, 381, Resp. Exhs. 19, 21). It is extremely improbable that none of the others obtained employment, but assuming that 20 men have remained totally unemployed, and taking a very high average of $100 per man per month for wages and maintenance (compare the wages provided by the I. S. U. contract, Resp. Exh. 14), respondent's liability would total $2,000 per month, or $60,000 from July 1937 to the end of December 1939.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. Supp. IV, Sec. 157 *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *
>
> * * * * *
>
> SEC. 10.
>
> (c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such af-

firmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

(f) * * * the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

Excerpts from Exhibits, as noted. Originals of all exhibits are on file in the office of the Clerk.

RESPONDENT'S EXHIBIT NO. 14

INTERNATIONAL SEAMEN'S UNION OF AMERICA

ATLANTIC AND GULF DISTRICT

Eastern and Gulf Sailors' Association, Inc.
Marine Firemen, Oilers and Watertenders' Union of the Atlantic and Gulf

Marine Cooks and Stewards' Union of the Atlantic and Gulf

AGREEMENT WITH ATLANTIC AND GULF STEAMSHIP COMPANIES

Effective as of January 1, 1935. As Amended March 9, 1936. As Amended September 28, 1936. As amended February 3, 1937.

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Article II—Preference

SECTION 1. It is understood and agreed that, as vacancies occur, members of the International Seamen's Union of America, who are citizens of the United States, shall be given preference of employment, if they can satisfactorily qualify to fill the respective positions; provided, however, that this

Section shall not be construed to require the discharge of any employee who may not desire to join the Union, or to apply to prompt reshipment, or absence due to illness or accident.

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SECTION 3. The authorized representatives of the Union shall have the right to go on board ships covered by this agreement, subject to regulations prescribed by the Owners, for the purpose of consulting with seamen employed thereon. Under no circumstances shall representatives of the Union interfere with the men while at work, and on no account is ship work or sailing of ship to be hindered or delayed.

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Article III—Wages

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When vessels are in commission and the men are on articles or port payroll, and sleeping accommodations and or subsistence are not furnished, a cash allowance of 75 cents per night for lodging, and 35 cents per meal shall be allowed each man.

Article IV—Working Rules

SECTION 1. Any work for the safety of the vessel, passengers, crew or cargo shall be done at any time.

The following provisions relating to working hours shall govern the employment of unlicensed personnel:

In deck and engine departments. Straight time shall be paid for the following hours:

* * * * * *

(c) In Home Port, all men may be required to work eight (8) hours daily from 8

A. M. to 5 P. M., except Saturday afternoons, Sundays, and the following legal holidays: New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day; provided, that on ships sailing on said excepted days, where sea watches are set at Noon, overtime shall be excluded. Time for boat and fire drills and other emergency work for the safety of the ship, its passengers, crew or cargo, may be required in excess of the above eight (8) hours.

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Overtime.—Overtime shall be paid for the following hours:

* * * * *

(c) In Home Port, all hours worked in excess of eight (8) hours straight time according to law, except fire and boat drills and other emergency work for the safety of the ship, its passengers, crew or cargo; Saturday afternoons, Sundays and the following legal holidays: New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day shall be considered overtime, except as provided in subsections 1 (c) and 1 (d) of Section A above.

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In Steward's Department.—1. Straight time shall be paid for the following hours:

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(c) In Home Port And Terminal Ports, all men shall be required to work eight (8) hours daily between six (6) A. M. and seven (7) P. M. except Saturday afternoons, Sundays, and the following legal holidays: New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day; provided, that if a ship arrives or

sails on the above specified days overtime shall be excluded. Fire and boat drills and other emergency work for the safety of the ship, its passengers, crew or cargo, may be required in excess of the above (8) hours.

(d) Home Port shall be considered to be the port at which shipping articles are opened, or the port at which crew is paid off upon completion of voyage.

RESPONDENT'S EXHIBIT NO. 25

WATERMAN STEAMSHIP CORPORATION,
INTER-OFFICE CORRESPONDENCE,
Mobile, Alabama, July 1, 1937.

S. S. *Bienville*, #2, Voyage Termination.

To all DEPARTMENTS:

The above vessel is due to arrive in Tampa on July 1st, from Hamburg, with 797 tons inward cargo for Tampa, 29 Panama City, 188 Pensacola, 38 Gulfport, and 1,616 Mobile.

From Tampa she will proceed to Pensacola and Mobile. Voyage #2 will end at midnight following completion of discharge of the Mobile cargo, at which time the vessel will go on inactive status for a period of about twenty days.

C. Reed,
C. REED, *Port Captain.*

CR/L.
cc to Tampa, Panama City, Pensacola, Gulfport. Captain F. O. Lund.
(Attached to above:)

Sailing schedule—April thru August, 1937

Steamer	Position	Due gulf	Due sail Eastbound	Discharging Ports	Due return Gulf	Turn around
Bienville	.....	.....	Sailed 5/9	Havre/Antwerp/ Rotterdam/ Bremen/Hamburg.	7/2	60
Bienville	Repair	7/7	7/30	Liverpool/Manchester/Avonmouth via Canada.	9/22	60

RESPONDENT'S EXHIBIT NO. 26

MOBILE OCEANIC LINE,
LE HAVRE, FRANCE, *May 30th, 1937.*

Received June 10, 1937, Waterman Steamship Corp.

Capt. C. REED, *Port Capt.*
Waterman S. S. Corp., Mobile, Ala.

DEAR SIR: I beg to advice you that we arrived at Havre Pilot station on May 26th at 8:20 P. M. and at the C. I. M. dock at Havre 11:40 p. m. Average speed between Pilot stations was 10.87 knots, and fuel consumption 193 BBls per 24 hours.

We had very good passage over, smooth sea all the way. It seems to me that this ship ought to do better than that in such ideal weather conditions, but that is about the best that we can get out of her. Our passengers seems to be satisfied, at least they did'nt say anything to me. As it is now we can't give much service to passengers, if we do, the Stewards departments over time will be lot. Anyhow this Stewards department don't know how to serve people. Our Cooks claiming some over time every day, they say that they can't get they work done in 9 hours.

There is nothing much I can do about it now, if I try to do anything, the whole gang may walk out on me. If I had Steward that knows his job, I think thing would be different. 2nd Cook claims that if he don't start the fire in the stove at 5:00 a. m., they can't get the Breakfast ready by 7:30 a. m. The stove is old and don't work so good, but I think if they wanted to they could get their work done alright.

Mr. Hansen is doing fine, he is really good man and other mates is doing good as can be expected from New York mates. Everything has been going on very smoothly on board here sofar.

I had awful time with my leg first 10 days after leaving Tampa, but it is getting much better now and will be all well by the time I get back there again.

Please find herewith inclosed two copies of Consular note of protest, will forward all daily reports under separate cover.

Yours very respectfully,

F. O. LUND,
Master S. S. Bienville.

U. S. GOVERNMENT PRINTING OFFICE: 1933